dence in the cause, they have not satisfactorily explained their connection therewith. It was for them, by clear and explicit proofs, to establish their case. They have not done so. Their goods stand affected by the fraud, and must share the fate of the contraband articles.

If Harman was not their agent in this transaction, then they shipped the goods in dispute without any permit whatever, and the same legal consequence follows.

Independent of the apparent fraud, the permit covered none of Harman & Daily's goods, and could not be lawfully used for such a purpose. They were not named in the permit as applicants or consignees. The license was personal to Hicks & Cocke; it covered only *their* shipments; it was not negotiable or transferrable; it could not be made to include anything not specified in it. The attempt to use it otherwise, worked a forfeiture of the whole shipment.

The claim is dismissed, with costs, and the property declared forfeited.

RECENT ENGLISH DECISIONS.

Court of Common Pleas.

JOHNSON, ASSIGNEE OF CUMING, *vs.* STEAR.

In trover by the assignees of a bankrupt, the facts were, that the bankrupt had deposited certain dock warrants for brandy in dock as security for a loan; and it was agreed that the pledgee might sell the brandy if the loan was not repaid on the 29th January. The pledgee sold the brandy on the 28th of January, and delivered the dock warrants to the purchaser on the 29th, and the purchaser took possession on the 30th. The bankrupt would not have redeemed the dock warrants:—*Held*, that the sale and delivery of the dock warrants was a conversion by the pledgee.

Per ERLE, C. J., BYLES and KEATING, JJ.—That the damage recoverable for the conversion was to be measured by the loss actually sustained by the pledger, and that, in measuring the damage, the interest of the pledgee in the pledge at the time of conversion is to be taken into account.

WILLIAMS, J.—That the sale of the brandy by the pledgee before the time agreed, terminated the bailment, and thereupon the property reverted absolutely to the pledger, and, therefore, that the measure of damage is the value of the goods at the time of conversion.

Trover by the assignees of one Cuming, a bankrupt, for certain cases of brandy. Pleas.—Not guilty, and not possessed.

At the trial, before Erle, C. J., at the Sittings in London after Easter Term, it appeared that the plaintiff was the assignee of John Cuming, a commission agent; and in the year 1862, John Cuming borrowed of the defendant the sum of 62*l.* 10*s.*, and gave him a bill of exchange, payable on the 29th January, 1863, and also deposited with him, by way of security, dock warrants of 243 cases of brandy, and wrote to him the following letter:—

"Sir,—I have this deposited with you the undermentioned 243 cases of brandy, to be held by you as a security for the payment of my acceptance for 62*l.* 10*s.*, discounted by you, which will become due on the 29th January, 1863; and in case the same be not paid at maturity, I authorize you at any time, and without further consent by, or notice to, me, to sell the goods above mentioned, either by public or private sale, at such price as you think fit, and to apply the proceeds, after all charges, to the payment of the bill; and, if there should be any deficiency, I engage to pay it.

"I am, yours, truly,

"MOORE, CUMING & Co."

On the 16th January, 1863, the said John Cuming was adjudicated a bankrupt; and on the 28th January the defendant sold the brandy, and the ordinary bought and sold notes were exchanged between the defendant and the purchaser. On the 29th January the defendant delivered to the purchaser the dock warrants for the brandy, who, on the 30th, obtained possession. The jury found a verdict for the plaintiff for the value of the brandy. The learned judge gave the defendant leave to move to enter the verdict for him, or to reduce the damages to 40*s.*

Powell, Q. C., obtained a rule accordingly.

Denman, Q. C., and *Howard* showed cause.—The delivery of

the dock warrants to the purchaser on the 29th, pursuant to the agreement on the 28th, was a wrongful conversion by the defendant on the 28th. The property in the brandy passed to the purchaser on the 28th, for the delivery of the dock warrants on the 29th was only part of the sale on the 28th, but the delivery of the dock warrants was certainly a conversion. It was the only delivery which could be effected. [They cited Addison on Torts 193, and *Jones* v. *Cliff*, 1 Cr. & M. 540.]

Powell, Q. C., in support of the rule.—Admitting that the defendant had entered into a binding contract with the purchaser to sell the brandy on the 28th, there was no conversion until the purchaser obtained possession, which was not till the 30th. All that the bought and sold notes would do would be to give the purchaser a right of action against the defendant if he had not delivered the brandy. The defendant, by taking this liability on himself, did not prejudice the plaintiff. There was no evidence to show that the dock warrants were delivered during banking hours, on the 29th, and if the loan was not paid within banking hours, the defendant had a right to sell. [He cited Cross on Lien 385; *Ellis and Others* v. *Hunt and Others*, 3 T. R. 464; *Zwinger* v. *Samuda*, 7 Taunt. 265; *Lucas and Others* v. *Dorien and Others*, Id. 278; and *Spear* v. *Traners and Another*, 4 Camp. 251.]

Cur. adv. vult.

ERLE, C. J., delivered the judgment of the Court.—This was an action of trover by an assignee, under the bankruptcy of one Cuming. The facts were, that Cuming had deposited brandy, lying in a dock, with Stear, by delivering to him the dock warrants, and had agreed that Stear might sell if the loan was not repaid on the 29th January; that on the 28th January Stear sold the brandy, and on the 29th handed over the dock warrants to the vendee, who, on the 30th, took actual possession. Upon these facts the questions are, first, was there a conversion, and if yes, secondly, what is the measure of damages. To the first question our answer is in the affirmative. The wrongful sale on the 28th, followed on the 29th by the delivery of the dock warrants then in pursuance thereof, was, we think, a conversion; the defendant wrongfully assumed to be owner in

selling, and although the sale alone might not be a conversion, yet by delivering over the dock warrants to the vendee, in pursuance of such sale, he interfered with the right which Cuming had of taking possession on the 29th if he repaid the loan, for which purpose the dock warrants would have been important instruments. We decide for the plaintiff on this ground, and it is not necessary to consider the other grounds on which he relied to prove a conversion. Then the second question arises. The plaintiff contends that he is entitled to the full value of the goods sold by the defendant, without any deduction, on the ground that the interest of the defendant as bailee ceased when he made a wrongful sale, and that, therefore, he became liable to all the damages which a mere wrongdoer, who had wilfully appropriated to himself the property of another without any right, ought to pay.

But we are of opinion that the plaintiff was not entitled to the full value of the goods. The deposit of the goods in question with the defendant to secure repayment of a loan to him on a given day, with a power to sell in case of default on that day, created an interest and a right of property in the goods which was more than a mere lien, and the wrongful acts of the pawnee did not annihilate the contract between the parties, nor the interest of the pawner in the goods under that contract. It is clear that the actual damage was merely nominal; the defendant by mistake delivered over the dock warrants a few hours only before the sale and delivery by him would have been lawful, and by such premature delivery the plaintiff did not lose anything, as he had no intention to redeem the pledge by paying the loan. If the plaintiff's action had been for breach of contract in not keeping the pledge till the given day, he would have been entitled to be compensated for the loss he had really sustained, and no more, and that would be a nominal loss only. The plaintiff's action here is in name for the wrongful conversion, but in substance it is the same cause of action, and the change of the form of pleading ought not in reason to affect the amount of compensation to be paid. There is authority for holding, that in measuring the damage to be paid to the pawner by the pawnee for a wrongful conversion of the pledge, the inte-

rest of the pawnee in the pledge ought to be taken into account. On this principle the damages were measured in *Chinery* vs. *Viall*, 5 H. & Norm. 288. There the defendant had sold sheep to the plaintiff; because there was delay in the payment of the price by the plaintiff, the defendant resold the sheep. For this wrong the Court held that trover lay, and that the plaintiff was entitled to recover damages; but in measuring the amount of those damages, although the plaintiff was entitled to be indemnified against any loss he had really sustained by the resale, yet that the defendant, as an unpaid vendor, had an interest in the sheep against the vendee under the contract of sale, and might deduct the price due to himself from the plaintiff from the value of the sheep at the time of the conversion. In Story on Bailments, art. 315, it is said—"If the pawner, in consequence of any default or conversion by the pawnee, has, by an action, recovered the value of the pawn, still the debt remains, and is recoverable, unless in some prior action it has been deducted. It seems, that by the common law, the pawnee, in such action brought for the tort, has a right to have the amount of his debt recouped in damages." For this he cites *Jarvis* vs. *Rogers*, 15 Mass. Rep. 389. The principle is also exemplified in *Brierly* vs. *Kendall*, 17 Q. B. 937. There, although the form of the security was mortgage, and not a pledge; and although the action was trespass, and not trover; yet the substance of the transaction was in close analogy with the present case. There was a loan by the defendant to the plaintiff, secured by a bill of sale of the plaintiff's goods, in which was a reservation to the plaintiff of right to the possession of the goods till he should make default in some payment. Before any default, the defendant took the goods from the plaintiff, and sold them. For this wrong he was liable in trespass, but the measure of damages was held to be, not the value of the goods, but the loss which the plaintiff had really sustained by being deprived of the possession. The wrongful act of the defendant did not annihilate his interest in the goods under the bill of sale, and such interest was to be considered in measuring the extent of the plaintiff's right to damages. On these authorities we hold, that the damages due to the plaintiff for the

wrongful conversion of the pledge by the defendant are to be measured by the loss he has really sustained, and that in measuring those damages, the bailment of the defendant in the pledge at the time of the conversion is to be taken into the account. It follows that the amount is merely nominal; therefore, rule that the verdict for the plaintiff shall stand, with damages 40*s*.

WILLIAMS, J.—I am of the same opinion as to the first point, viz. whether there was a conversion by the defendant, but I do not agree with the rest of the court in the view they take of the other point, namely, the question as to the amount of damages. As to the first point, I think the delivery of the dock warrants was a conversion. It is, in fact, the means by which property which is incapable of manual transfer can be got at, and therefore the delivery by the pledgee of the dock warrants to the vendee prevented the present plaintiff from getting it, and enabled the purchaser to get possession of it. As to the amount of damages, I think the plaintiff is entitled to have the full value of the goods. I apprehend the general rule to be this—in an action of trover the true measure of damages is the value of the property at the time of the conversion. No doubt that rule is subject to several exceptions; one of which is the ordinary rule, that where the defendant has taken back the thing which is the subject of the action, the plaintiff can then only recover the damages he has sustained by reason of the mere detention. Again: there is an exception in respect of the amount of interest of the plaintiff, if the plaintiff has only a limited interest, and some other person has a further interest posterior to the plaintiff. But the law, I apprehend, is clear, that though, as against a stranger, the plaintiff who has to part with his interest is entitled to recover the whole amount of damages, yet as against a person who has a joint interest with him in the property, he is entitled to recover only in respect to such interest as he himself has. Such was the decision in *Brierly* vs. *Kendall*. The property was in the possession of the plaintiff, and the plaintiff, by the deed of assignment, had a specific, or a particular, estate in the property assigned. Therefore, the only subject to be considered would be the amount of damages; and that case is only an example as to

the measure of damage between two parties, both having an interest in the property. The plaintiff can only recover in respect of the extent of his interest. Then comes the question as to the lien. I certainly thought the law was settled, that if a person has a lien upon property, and sells the property which is the subject of the lien, he destroys the right of lien, and altogether annihilates the lien. That, I apprehend, will be found to be the principle upon which a great number of cases have been decided. I only refer to one class, because that is the class which is referred to in Story on Bailments, art. 325. He says, "The doctrine of the common law, now established in England, after some diversity of opinion, is, that a factor, having a lien on goods for advances, or for a general balance, has no right to pledge the goods; and if he does pledge them, he conveys no title to the pledgee. The effect of this doctrine is, in England, to deny to the pledgee any right in such a case to retain the goods for the advances or balances due to the factor. In short, the transfer is deemed wholly tortious; so that the principal may sue for and recover the pledge, without making any allowance or deduction whatsoever for the debts due by him to the factor." The same learned writer then goes on to state, that "the inconvenience, not to say the harshness, of the latter part of the doctrine has been very seriously felt in England;" and he goes on to express his hope, that the American courts would not feel themselves constrained by the pressure of authority to yield to it. However, the editor of the last edition of Story on Bailments adds, that "later decisions have, however, fully settled the law, that a pledge by a factor of his principal's goods is wholly tortious, and the owner may recover their full value from the pledger, without any deduction or recoupment for his claim against the factor." The recent case of *Siebel* vs. *Springfield*, 9 Law T., N. S., 325, decided two or three days ago in the Court of Queen's Bench, establishes the principle as to the right of the owner of goods, subject to a lien to recover the whole value of them, in case the party entitled to the lien converts them; and the law, I apprehend, is adopted in that case. But then, that being the law as to lien, I apprehend there is no doubt the case of *Chinery* vs. *Viall* estab-

lishes the rule, that in the case of a resale by an unpaid vendor, an action of trover may be maintained by the original vendee, but that he can only recover the value of the bargain, and not the entire value of the goods. That, I apprehend, is put upon the ground of the peculiar position of an unpaid vendor, upon the principle that he has more than a lien; has an interest greater than the lien of the goods. The interest which he has is not merely the result of the contract by which the lien is created; he has an ulterior interest, and an interest altogether beyond the lien. That is the ground on which that case may be considered as not extending to the general principle, but applicable only to the peculiar position of an unpaid vendor. But with respect to a pawnee, it may be conceded, that he may have something more than a mere lien; but whatever his estate may be, I apprehend, that as soon as the bailment has terminated, that estate would also terminate, because it is the mere creature of the bailment. There is no interest whatever in the pledgee not derived from the bailment; therefore, as soon as the bailment comes to an end, the estate, whatever it may be, of the pledgee dependent on, and growing from, the bailment, must also be annihilated. In Story on Bailments, that question is to a certain extent considered; and in sect. 327 the author says, "It has been intimated that there is, or may be, a distinction favorable to the pledgee which does not apply, or may not apply, to a factor, since the latter has but a lien, whereas the former has a special property, in the goods. It is not very easy to point out any substantial distinction between the case of a pledgee and the case of a factor. The latter holds the goods of his principal as a security and pledge for his advances, and the other feels he has a special property in them, and may maintain an action for any violation of his possession, either by the principal or by a stranger." There is also a case (*Whitaker* vs. *Sumner*, 20 Pick. Rep. 399), referred to in Story on Bailments, in support of the proposition laid down in Story, art. 299, that if the pledgee voluntarily, by his own act, places the pledge beyond his own power to restore it, as by agreeing that it may be attached at the suit of a third party, that will amount to a waiver of his pledge. The case we have now under consideration

is one of bailment. It remains to consider, what is the effect of the bailment being terminated? It is, I apprehend, as, if the bailment had never existed, the property reverts to the pledger as absolute owner of it. Then it becomes a question, what damages the absolute owner is entitled to recover against the person who converts his property? I conceive the true rule as to the damages, where an action of trover lies, is, that if the plaintiff could resume the property, supposing he had an opportunity of laying his hands upon it, and become the rightful and absolute owner against all the world, he is entitled to recover full damages; and in the present case, supposing that, instead of bringing this action, he had had the means of getting the brandy back into his possession, I apprehend he would have been entitled to hold, not only as against the present defendant, but as against everybody else. Therefore, the action of trover, which is substituted for his right of resumption, ought to be treated upon the footing of his being the absolute owner, and deprived of his property. So, I apprehend, if the action was brought against the vendee, it would be precisely the case of an action brought against the pledgee of a factor, and just as in that case, the pledgee of the factor, though he is a perfectly innocent pledgee, cannot get damages in law with respect to the amount due from the owner of the goods; so, by analogy to that in this case, the vendee of the present defendant would be unable to set up any claim whatever under an assignment from the plaintiff to the defendants. The defendants, therefore, were liable to the full damages.

Rule absolute, that the verdict for the plaintiff should stand, with 40*s.* damages.

ABSTRACTS OF RECENT AMERICAN DECISIONS.

SUPREME COURT OF NEW YORK.[1]

Insurance—Agent of Insurers interested in Risk.—Where an agent of an insurance company, authorized to effect insurances on vessels, &c., and

[1] From Hon. O. L. Barbour, to appear in Vol. 41 of his Reports.